

DOCKET FILE COPY ORIGINAL
RECEIVED
NOV 10 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)

Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

PP Docket No. 93-253

COMMENTS OF THE JOINT PARTIES

Cablevision Industries Corporation
Comcast Corporation
Cox Cable Communications,
a division of Cox Communications, Inc.
Jones Intercable, Inc.

Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

November 10, 1993

No. of Copies rec'd
List ABCDE

079

RECEIVED
NOV 11 0 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act)
Competitive Bidding)

COMMENTS OF THE JOINT PARTIES

Cablevision Industries Corporation, Comcast Corporation, Cox Cable Communications, a division of Cox Communications, Inc., and Jones Intercable, Inc., by their attorneys, hereby submit their comments in response to the Notice of Proposed Rulemaking to establish competitive bidding procedures for issuance of initial licenses for use of radio spectrum.^{1/} The Notice implements provisions of the recent amendment to the Communications Act of 1934 ("Communications Act"), which grants the Commission limited authority to use competitive bidding to issue radio spectrum licenses.^{2/}

INTRODUCTION

Section 309(j)(2)(A) of the Communications Act requires that competitive bidding be used when the Commission determines that the principal

^{1/} See Notice of Proposed Rulemaking, adopted September 23, 1993, released October 12, 1993 ("Notice").

^{2/} Communications Act of 1934, as amended, 47 U.S.C. §§ 151-713, as amended by Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 the ("Budget Act").

use of spectrum will or is likely to involve a licensee receiving compensation from subscribers in exchange for communications signals.^{3/} Congress repeatedly emphasized that it was only granting the Commission authority to utilize the competitive bidding process in a few select circumstances. According to the House Committee Report, which was incorporated by reference in the Conference Report, there are only "limited cases in which competitive bidding would be appropriate and in the public interest," and Congress specifically limited its grant of authority to the Commission so "only those classes of licenses would be issued utilizing a system of competitive bidding."^{4/} In addition, Congress noted that the licensing of "virtually all private services" should be unaffected by the new system.^{5/} Thus, the Commission may use competitive bidding only for those services that substantially meet all of the criteria prescribed by the legislation.

In order for a service to be subject to competitive bidding, Section 309(j) requires (i) that there be mutual exclusivity among license applications and (ii) that the principal use of the spectrum will include the licensee receiving compensation from the subscriber.^{6/} Additionally, those subscribers must receive or transmit communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate. Finally, the system of competitive

^{3/} 47 U.S.C. § 309(j)(2)(A) (1993).

^{4/} H.R. Rep. No. 103-111, 103d Cong. 1st Sess. 253 (1993) ("House Report").

^{5/} Id.

^{6/} Notice at 9.

bidding must promote the public interest objectives the legislation was designed to achieve.

In the Notice, the Commission stated that the use of CARS frequencies by cable television companies "seems" to meet at least one of these criteria, since the use of such frequencies is an "integral" part of end-to-end service which ultimately leads to subscribers receiving communications signals.^{7/} However, none of the criteria required by the statute are satisfied in the case of the CARS service. Therefore, the Commission's proposal to apply spectrum auctions to the CARS service should not be adopted.

I. APPLICATIONS FOR USE OF THE CARS SPECTRUM ARE NOT MUTUALLY EXCLUSIVE UNDER THE COMMISSION'S PROCESSING REGULATIONS

The CARS service should not be subject to competitive bidding because applications in the CARS service are not mutually exclusive. The Commission has the authority to utilize competitive bidding only when it must choose among two or more mutually exclusive applications for a license.^{8/} This situation simply does not arise with respect to the CARS service because the Commission's application process precludes mutual exclusivity for particular frequencies. Section 78.19(a) of the Commission's regulations provides that prior to submitting an application for a CARS license a cable operator must conduct coordination studies and select a frequency that is least likely to interfere with

^{7/} Id. at 10.

^{8/} 47 U.S.C. § 309(j)(1) (1993).

other licensees in the same area.^{9/} If there is a conflict between the proposed use of the CARS spectrum and any other licensee, then the earlier applicant has priority use of the spectrum.^{10/} Thus, the Commission's application process is not designed to choose between competing applicants for a particular frequency, but to coordinate the CARS spectrum so all potential users may take full advantage of it.

While the Commission's regulations ensure that applicants for the CARS spectrum do not interfere with existing licensees, there is simply no procedure for selecting between applicants who are seeking to utilize the same CARS frequency. Section 78.13(c) provides that all qualified cable operators are eligible for a CARS station license if the frequency is available and the public interest, convenience and necessity will be served.^{11/} Competitive bidding is incompatible with the allocation of the CARS spectrum because the Commission's concern is resolving the practical problem of frequency interference, and that problem is resolved on a first-come, first-served basis under the rules by a precoordination process. Moreover, the nature of the CARS service generally enables applicants to tailor their applications so as not to create a situation of mutually exclusivity. Because CARS is a point-to-point rather than an omnidirectional service, applicants can take measures that will preclude potential

^{9/} 47 C.F.R. § 78.19(a) (1992).

^{10/} Id. § 78.18(j).

^{11/} Id. § 78.13(c).

interference with other CARS users or co-users of the service.^{12/} In sum, the nature and characteristics of the CARS service and the Commission's processing of CARS applications preclude mutual exclusivity and thus disqualify the CARS service from competitive bidding.

II. THE PUBLIC INTEREST IS NOT SERVED BY
USING THE COMPETITIVE BIDDING PROCESS
TO ALLOCATE THE CARS SPECTRUM

Section 309(j) provides that competitive bidding should only be utilized if it promotes a number of public interest objectives.^{14/} Subjecting the CARS spectrum to competitive bidding would serve none of those objectives and would, in fact, disserve the public interest.

For example, Congress directed the Commission to use competitive bidding to foster the development and rapid deployment of new technologies for the benefit of the public, including those residing in rural areas.^{15/} The Commission therefore proposes to adopt regulations implementing competitive bidding to award new blocks of frequencies in the PCS and LMDS services, which have the potential to provide the public with new and innovative services. Because

^{12/} Cable operators share frequencies in the CARS spectrum with other services such as MMDS, private operational fixed service and broadcast auxiliary service. See First Report and Order in Docket 82-334, 54 R.R.2d 1001, 1009 (1983) (implementing new coordination procedures to facilitate sharing of CARS spectrum).

^{14/} 47 U.S.C. 309(j)(2)(B) 1993.

^{15/} Id. § 309(j)(3)(A).

the frequencies in these services are mutually exclusive, the Commission would be required to rely on arbitrary lotteries or hold time-consuming comparative hearings if competitive bidding were not available. Competitive bidding, therefore, would expedite the allocation of licenses for such new services.

But competitive bidding for CARS spectrum serves no such purpose. Under the current licensing scheme, as described above, there are generally no other mutually exclusive applicants for CARS spectrum. Cable operators can obtain licenses for such spectrum without delay, simply by identifying available frequencies that do not interfere with existing users.

Moreover, replacing the existing licensing scheme with competitive bidding will not serve the statutory goal of promoting "efficient and intensive use of the electromagnetic spectrum."^{16/} To the contrary, the current scheme maximizes efficiency by requiring cable operators to find and use frequencies that will not conflict with other licensed uses. Competitive bidding between CARS applicants and other users of spectrum in the CARS band will result in fewer users and less efficient use of that spectrum.

Finally, to the extent that such competitive bidding results in the unavailability of CARS frequencies for cable operators, the public policy rationale for making CARS spectrum generally available would be undermined. The CARS service is designed to be used as an alternative to wire transmission, where such transmission is impractical because of the distance between headends, or where

^{16/} Id. § 309(j)(3)(D).

there are higher expenses associated with the use of wire.^{17/} This decreases the cost of providing cable service, making such service more widely available and making it possible to add new programming services.

These public policy benefits would be lost if a cable operator lost the use of CARS frequencies to a higher bidder for the spectrum. Indeed, even if the cable operator won the auction, the resulting payment for spectrum would reduce the economic advantages that the CARS service provides. These outcomes would be particularly serious in rural areas where the costs of laying cable are high because of low population density.

III. CARS FREQUENCIES ARE NOT RECEIVED BY
SUBSCRIBERS IN EXCHANGE FOR COMPENSATION SO
THEY SHOULD NOT BE SUBJECT TO COMPETITIVE
BIDDING

The CARS spectrum is not the type of service for which Congress intended to authorize competitive bidding. All of the uses of the CARS spectrum fall within the scope of "private services," which Congress defines as any services that do not involve the receipt of compensation by subscribers. CARS frequencies provide internal and intermediate links by which cable operators overcome long distances between off-air receive points or two or more systems, and where the use of cable is impractical and too costly. The CARS spectrum is also used by cable operators for other purposes, but none of them involve the transmission of signals to subscribers in exchange for compensation. For example, cable

^{17/} 47 C.F.R. § 78.11(b) (1992).

operators use the CARS spectrum to transmit communications to and from schools, origination studios, and municipal and other public offices. Also, Section 78.11 of the Commission's rules allows uses of the CARS spectrum that are "directly related to the operation of the relay system (including voice communications, telemetry signals, alerting signals, fault reporting signals and control signals)."^{18/} The Commission has held that under this rule a cable operator could use CARS frequencies to facilitate the dispatch of service vehicles providing maintenance to the cable system.^{19/} All of these uses of the CARS spectrum involve private services, because they are not provided in exchange for compensation from the subscriber.

The principal distinction between the CARS service and other services for which the Commission is considering competitive bidding is that CARS frequencies do not "enable subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate."^{20/} CARS frequencies are down-converted to different frequencies at a receiving site and the signals are then transmitted over those frequencies -- the VHF, "mid-band", and "superband" frequencies; however, these frequencies do not constitute spectrum pursuant to Section 309(j) which is being used by subscribers to transmit or receive services. Simply because the CARS spectrum is used as an

^{18/} 47 C.F.R. § 78.11(b) (1992).

^{19/} See The TM Communications Co., 46 R.R.2d 1380, 1381 (1980).

^{20/} 47 U.S.C. §309 (j)(2)(A)(1) (1993).

internal transmission system that permits the operator to internally transmit programming from one point on its system to another does not make the CARS spectrum a service which is subject to competitive bidding under the statute.^{21/}

The Commission itself recognized in the Notice that the use of the spectrum by CARS licensees can be distinguished from use of the spectrum by MMDS or wireless cable operators, which transmit signals directly to subscribers.^{22/} Similarly, PCS customers will use the spectrum directly to transmit and receive signals. Clearly, providers of these types of services are receiving compensation in exchange for the same signals they are sending out over the spectrum and are not using the frequencies for private use. The legislative history of Section 309(j)(2) illustrates the use to which Congress intended competitive bidding to be put. Competitive bidding is to be used only where "the Commission determines that the principal use of the spectrum will be to, in essence, resell the spectrum to subscribers" and that an auction will meet the public interest objectives of the statute.^{23/} The Commission reasoned that the CARS spectrum should be subject to competitive bidding because it serves as a

^{21/} It has clearly and repeatedly been stated that courts are bound to give effect to the literal meaning of statutory text when it is "plain" or "clear and unambiguous." American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); see also Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.").

^{22/} Notice at 10 n.10.

^{23/} House Report at 253.

"vital" link in the end-to-end service offered by cable operators.^{24/} However, Congress intended that the Commission base its decision whether to use competitive bidding not on the importance of the service to the licensee, but solely on the criteria set forth in the statute. And, based on this test, the CARS service should not be included among those services which the Commission designates as subject to competitive bidding.

IV. CONCLUSION

For the foregoing reasons, the Commission should not adopt its tentative conclusion that the CARS service should be subject to competitive bidding.

Respectfully submitted,

Cablevision Industries Corporation
Comcast Corporation
Cox Cable Communications, a division of Cox
Communications, Inc.
Jones Intercable, Inc.

By: 

Peter H. Feinberg
Michael S. Schooler
Jeffrey A. Brueggeman

Their Attorneys

Dow, Lohnes & Albertson
1255 23rd Street, N.W., Suite 500
Washington, D.C. 20037

November 10, 1993

^{24/} Notice at 10.